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Supreme Court of the United States

OCTOBER TERM, 1940

MIKHAIL NICHOLAS GORIN,
Petitioner,
v.
UNITED STATES OF AMERICA
No. 87

HAFIS SALICH,
Petitioner,
v.
UNITED STATES OF AMERICA
No. 88

REPLY BRIEF FOR PETITIONERS

DONALD R. RICHBERG,
SETH W. RICHARDSON,
ISAAC PACHT,
CLORE WARNE,
Attorneys for Petitioner M. N. Gorin.

HARRY GRAHAM BALTER,
Attorney for Petitioner H. Salich.

WILLARD J. STONE, JR.,
Of Counsel for Petitioner Salich.

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SUBJECT INDEX

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REPLY BRIEF FOR PETITIONERS

The purpose of this reply brief is to narrow the issues as they have been developed in the previous briefs and to endeavor to focus attention upon those matters which should have decisive weight.

The government endeavors to sustain the convictions of petitioners by a series of alternative propositions which are somewhat contradictory; and each of them has an inherent weakness. It may help to focus attention upon the ultimately decisive issue for us to review, briefly, these propositions.

THE GOVERNMENT'S FIRST PROPOSITION

(Govt. Brief, pp. 15; 21-36).

The government argues (A) that petitioners were convicted under their own construction of the Espionage Act, because the trial judge, in defining "national defense", limited its meaning to the places and things enumerated in Section 1 (a) of the Act, and left it to the jury to determine only whether the revealed information was connected with or related to such places and things; and the government argues (B) "that the Naval Intelligence office at San Pedro is plainly included within the places enumerated in Section 1 (a)"; and so the government argues (C) that it was entirely proper to permit the jury to determine whether the revealed information was connected with or related to that "office".

A careful reading of Section 1 of the Espionage Act destroys the foregoing argument. The word "office" is plainly used to define a *building* or a *physical structure;* and is not used to define an organization or function of government. Section 1 (a) makes it an offense when anyone "goes upon, enters, flies over or otherwise obtains information concerning any vessel, * * * factory, mine, telegraph, telephone, wireless, or signal station, building, office or other *place* * connected with the national defense * * * or any *place* wherein any vessel, arms * * * are being made, prepared or stored * * * or any prohibited *place* within the meaning of Section 6". It is abundantly evident that places and physical structures are being described in Section 1

* Italics throughout the brief are ours unless otherwise indicated.

(a); and it is the revelation of information about such a place, and not information about the internal functioning of an "office", which is prohibited.

Section 1 (b) makes it an offense to copy any sketch, photograph, document "or note of anything connected with the national defense", and the subsequent clauses, (c), (d) and (e) use almost exactly the same words as in clause (b) to protect a record of "anything connected with or relating to the national defense". These terms must either describe records concerning the places and things specifically described in Section 1 (a) (except where a self-defining term such as "code-book" is used) or else they have no limitation whatsoever and create the broad offense of revealing any information which a jury may subsequently decide to be information "connected with or related to national defense".

The government's first proposition is, therefore, that the word "office" does not mean a place or a physical structure (although the Act specifically reads "office *or other place* connected with the national defense") but means a functional "office", so that revealing any information about the work of such an office is made a crime if a jury decides that it is information relating to the national defense. Now this, plainly, was *not* the construction of the law insisted upon by petitioners. This is simply another way of stating the construction of the law upon which the government relies, which is, that if anyone, by any means, obtains information which, in the judgment of a jury, relates to the national defense, he can be found guilty of the crime defined in the Espionage Act. The government's first proposition cannot be sustained unless the Court sustains the government's major proposition, which is, that the defini-

tion of the crime of revealing information relating to the national defense can be left to the judgment of a jury as an issue of fact.

THE GOVERNMENT'S SECOND PROPOSITION

(Govt. Brief, pp. 16; 36-63)

The government now argues that the Espionage Act clearly makes it an offense to reveal any information connected with the national defense "unrestricted by the particular places and things enumerated in Section 1 (a)". The government argues (A) that "a broad use of national defense is intended in Sections 1 (b) and 2 (a)", and that the "particularization of prohibited places is appropriate for Section 1 (a), which punishes simply going upon the place and looking about". Thus, the government rests its case upon the contention that Section 1 (a) can be entirely eliminated from consideration, and that the Act provides for the punishment of anyone who reveals information contained in any "writing or note of anything connected with the national defense" (Section 1 (b)) or who reveals any writing "or information relating to the national defense" (Section 2 (a)).

There are two plain answers to this second and major proposition of the government. First, the legislative history of the Act shows that the Congress explicitly refused to pass any such sweeping law, and that the places and things to be protected by the law were defined by the Congress for the very purpose of preventing the passage of such a vague and sweeping definition of a crime. (Pet. Brief pp. 24-33.) Second, no such sweeping definition of a crime has ever been upheld by this Court as constitutional. Certainly, such an

unconstitutional construction should not be given to the Act when it *can* be construed to define a crime with constitutional definiteness.

The government argues (B) that "the legislative history is equivocal, but supports our construction at least as much as that of petitioners". We submit that the legislative history is not equivocal; and that it is a pretty serious confession of weakness in the government's proposition to urge upon the Court that what was *said* by members of Congress can be used to obscure what the Congress *did*, as to which, the record is clear.[1] The Congress, as pointed out in our brief (p. 29), struck out the broad definition of an offense for which the government contends, and included in the final Act the closely defined crime of which petitioners were *not* guilty.

The government argues (C) that the purpose of the Espionage Act was to protect military and naval secrets, and argues (D) that the effect is "to protect information which, broadly speaking, is secret or confidential, and which is of a military nature...", and that petitioners were guilty of violating the Espionage Act "if the words 'national defense' be given their ordinarily broad meaning". In a word, the government contends that the convictions should be upheld on the basis that it is now a crime, carrying with it punishment by imprisonment "for not more than twenty years"—in time of peace (and death or imprisonment for not more than thirty years, in time of war), for anyone to obtain or reveal any information which a jury may be per-

[1] The government relies on what Senator Overman said in a previous session of Congress in debating a similar bill which was not enacted into law (Govt. Brief, p. 46).

suaded to regard as information "connected with or relating to the national defense". This is the proposition upon which the government really rests its case, and it is this construction of the law which the government contends is constitutional, in its third proposition.

Evidently aware of the weakness of this major proposition, the government argues (D) that:

> . . . "the statute does not punish the obtaining and disclosure of all information which might be thought to bear on the manifold activities, military and industrial, which comprise the national defense. Instead, the Act contains by its terms or by its plain implications three limitations upon its application: (1) The information must be obtained or revealed with the intent or reason to believe that it will be used to the injury of the United States or to the advantage of a foreign nation. (2) The information must have a military significance. (3) It must be secret or confidential information; either because it is derived from confidential sources or because it presents information outside the public domain which plainly should not be placed at foreign disposal. The first of these limitations is express; the second and third deserve a word of comment. (Govt. Brief, pp. 58, 59.)

The government brief thus tries to write into the Act qualifications upon its alleged breadth, which are not found in the Act, but only in the imagination of government counsel. The government brief states:

"Implicit in these enumerations is a connecting thread of similarity. They refer to matters of military or naval significance. . . . In a broad sense, it protects

military information which is secret or confidential." (Govt. Brief, pp. 59, 60.) This is a most extraordinary way of amending an Act of Congress in order to make it constitutional. This amending process is further explained in footnotes on pages 60 and 61 of the government brief.

According to established rules of construction, the generalized description of information relating to national defense may be made definite by tying it to the previous definition of places and things that are related to the national defense, so that anything of the same character may be regarded as included within the provisions of the law. The familiar maxim of construction, *ejusdem generis*, can be properly applied.

But the government's argument that revealing any information about national defense which is "confidential or secret in nature" is made a crime (implicitly) by the Espionage Act, is unsound for at least two reasons. First, there is no such limitation in the language of the Act, and, second, Congress could not have intended, and the government in other cases would not want any such limitation written into the Act.

The existence, for example, of a navy yard or a fort or a canal can hardly be regarded as information of a confidential or secret nature. Yet the exact location, structure or equipment of such a place may be kept away from common knowledge if photographs or intimate descriptions cannot be obtained. Without exercising the imagination, it must be apparent that the government would not wish to be met in many other cases with the defense that information obtained or revealed was not secret or confidential. Indeed, since a large number of the reports put in evidence against the de-

fendants in this case presented information which could not possibly be regarded as secret or confidential, then according to the government's present contention, such evidence was inadmissible and the admission of it a proper ground for reversal.

We submit that the effort in the government brief to amend the Act by writing in the qualification that the proscribed information must be secret or confidential is a significant confession that if the exact language of the Act must be construed as broadly as claimed by the government, then the Act must be held unconstitutional.

THE GOVERNMENT'S THIRD PROPOSITION

(Govt. Brief, pp. 17; 64-91)

The government concedes (A) that a statute is unconstitutional "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess its meaning". But the government finds it difficult to reconcile the decisions of this Court based on this "exemplary precept" —or, let us say, finds it difficult to reconcile these decisions with the government's argument—unless a great many of the foggy, hypertechnical contentions of the government can be sustained.

The government argues (B) that petitioners ought not to be allowed to raise the question, apparently because petitioners should have known that an unconstitutional construction of the statute might be invoked against them. This is an extraordinary reason for denying the right to raise a constitutional question. According to the government, apparently no one is entitled to question the constitutionality of a statute under which

he is convicted unless he has been taken completely by surprise in being charged with an offense!

The government argues (C)—and this, we assume, is its real argument—that the provisions of Sections 1 (b) and 2 (a), standing alone, "are not unconstitutionally indefinite". The government brief candidly admits "the language, it is true, is general; in some cases, generic terms of equal indefiniteness have been held valid, in others invalid". The government argues for validity in the present instance because "national defense is a term of common usage" and is "easily understood by those affected".

Admittedly, national defense is a term of common usage, but in these days, when national defense is commonly referred to as "total defense", it is difficult for anyone to understand what accepted meaning can be given to it short of a meaning covering everything in the way of industrial production and distribution, in the way of moral and patriotic stimulation, in the way of propaganda and efforts to promote national unity and vigor. In a word, "national defense", as now commonly used, covers at least a considerable part of most of the activities of most of the people of the United States.

Certainly, the government will not contend that if the Espionage Act is to be given a broad meaning, the government wishes it to be confined to the operations of military and naval forces, and does not want its protection extended over the production and transportation of supplies of every description essential to the maintenance of the military and naval forces. Certainly the government does not wish to take the position that under the constitutional power to provide for national

defense, an Act cannot be passed prohibiting the revelation of information regarding, or the sabotage of, industrial production which may be an essential part of the national defense.

It is just because the words "national defense" have such a broad meaning that it is essential to have the powers of the government supported by Acts specifically defining those activities which cannot be interfered with, without impairing the national defense. If the government is to rely upon a criminal statute, given the broad meaning which is here sought, then the constitutional protections of American citizens, in their right to have a crime defined so that it can be understood, will be swept away. Then, fear of punishment at the will of the executive will take the place of fear of punishment at the will of the people, expressed in legislation.

The government argues that the language cannot be made more precise without weakening the statute, that any uncertainty as to its meaning does not affect "innocent" activity, and there are strong reasons of policy for enacting the prohibition "in the most effective terms". (Govt. Brief, p. 19.) This is nothing more or less than a plea for executive dictatorship supported by the judiciary, with the liberties of the people dependent upon the ability of lawyers to convince juries that their clients should not be sent to jail because they are essentially "innocent", although indicted for the violation of a statute so broad that the mere allegation of guilt by the government raises a presumption of guilt.

For example, a labor organization or a newspaper publicly revealing information as to deplorable conditions in a factory producing military supplies might

only do so at the peril of being held guilty of communicating information (by publication) to a foreign government, while having good reason to believe that it would be "used to the injury of the United States".

THE GOVERNMENT'S FOURTH PROPOSITION

(Govt. Brief, pp. 19; 91-102)

The government, having sought to sustain these convictions on the basis of an intolerably broad definition of the offense created by the Espionage Act, makes its final plea on the ground that (A), even if the revealed information was "innocuous", defendants should be sent to jail because of obtaining information intended "to be used to the injury of the United States, or the advantage of a foreign nation". It is a little difficult to see how innocuous information could be harmful, so the real argument of the government is that the defendants had reason to believe that the information might be either injurious to the United States or advantageous to another nation and that, therefore, the fact that what they got was of no value does not relieve them of guilt.

But, the evidence makes it quite clear that the information was sought on the very basis and understanding that it would not be injurious to the United States to reveal it.

It is uncontradicted that Gorin told Salich that he did not want any information revealing military secrets, or in any way harming the United States; and that Russia was interested, just as the United States was interested, in knowing of the activities of Japanese spies. Salich's admitted report to his superiors of Gorin's proposition[1] shows that he did not have any

[1]Salich: R. 337, 341; Govt. witness Stanley: R. 135.

reason to believe he was doing anything injurious to the United States, and, since all the information furnished was "innocuous", the evidence supports the reasonableness of his belief and leaves open only one question which could be fairly asked: Why should Gorin seek the information if it would not be, in his opinion, to the advantage of his country, Russia?

This question brings forth another strained construction of the law which the government finds necessary to support the present convictions. First, they cannot be supported except by giving to the law an intolerable breadth, in accordance with which the Court would be expected to hold the statute unconstitutional. Second, even under such a construction, there is no crime unless information is obtained "with the intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation". It is plain in this case that the petitioners did not have the intent or reason to believe that the information was to be used to the injury of the United States. Therefore the convictions can only be supported upon the claim that the parties did have the intent or reason to believe that the information was to be used "to the advantage of a foreign nation".

Here, the government is forced to ignore the word used in the statute, which is "advantage", and to seek to have the statute construed as though it read "to be used for the *benefit* of any foreign nation". We submit that the word "advantage" was used and correctly used to mean the *advantage* of a foreign nation which would be to the *disadvantage* of the United States. The law was passed for the protection of the interests of the United States. The Congress was not interested in pre-

venting a foreign government from obtaining information which might be of some benefit to that government without any detriment to the United States. So the law was written, providing that the information must be intended to be used "to the injury of the United States" and, to make that injury not merely a positive harm but to cover even a negative harm, there was the further provision "or to the advantage of a foreign nation", which means, giving a foreign nation an advantage *over* the United States in some matter. (Pet. Brief, pp. 52-54.)

It must be emphasized again that the phrases we are discussing are those that describe a guilty knowledge or intent, which is made a necessary element in the crime defined. There must be evidence presented showing either an actual intent, or a reason to believe that the revelation of the information will actually injure the United States or give another nation an advantage over the United States.

It would be hard to imagine a case where the evidence could show more clearly than in the present case, that those convicted had no such guilty intent. Gorin did not seek any information about the military or naval armament or plans or activities of the United States. He said, in effect, to Salich: "As a part of your duties you are obtaining information as to Japanese who may be spying upon the United States. My government is also interested in locating Japanese spies." Salich's superior, according to Salich's uncontradicted testimony (R. 337) told him to keep up his contacts with Gorin, exchange harmless information and see what could be obtained in return.

There is nothing in the case upon which to base the conclusion that either Gorin or Salich had any intent or reason to believe that they were doing anything to the injury of the United States. Indeed, there is so much contrary evidence that the government is forced to rely on the one assumption which can be made, which is, that Gorin was trying to get information that would benefit his government. Then, in order to make that intent coincide with the intent required by the law, the government finds it necessary to write out the normal meaning of the word "advantage" and make it synonymous with the word "benefit", because there was no evidence upon which a jury would be justified in finding that the defendants had reason to believe they were doing anything which would be to the "advantage" of another nation—*against* the interests of the United States.

We have only stressed the government's fourth proposition in order to point out that the convictions in this case can only be supported by first, giving to the Espionage Act an unconstitutionally broad interpretation, and, second, making the requirement of guilty intent or knowledge practically meaningless whenever the representative of a foreign government is involved. Presumably, no representative of a foreign government, no foreign consul or special agent, would be seeking information in this country except for the benefit of his own country.

But, if it be held that the Act prohibits revealing any information connected with or relating to the national defense, then almost any information which any representative of a foreign government might seek to

obtain in this country would be proscribed; and there would be no defense available on the ground of lack of intent to injure the United States, because it would be obvious in every case that the information was sought for the benefit of another nation. Accordingly, if the "benefit" of another nation is to be regarded as synonymous with the "advantage" of another nation, then there will be no difficulty in ascribing a guilty intent to the most innocent investigations in this country by representatives of another friendly nation.

SUMMARY OF GOVERNMENT POSITION

The entire argument of the government can be summarized in the following statement in the government brief, page 61:

> "The phrase 'information connected with the national defense' as used in the context of the Espionage Act means, broadly, secret or confidential information which has its primary significance in relation to the possible armed conflicts in which this nation might be engaged."

The government's contention, therefore, is that the Congress could constitutionally enact, and has enacted a law reading, substantially, as follows:

> Whoever reveals any information that, in the judgment of a jury is "secret or confidential information which has its primary significance in relation to the possible armed conflicts in which this nation might be engaged" shall be punished by imprisonment for not more than twenty years.

The obvious unconstitutionality of such an act may seem to make the government's quoted statement a

careless exaggeration of the government contention. But when the government brief is carefully read, it will be evident that page after page of the argument is consumed with attempted justifications of exactly such a law.

On page 27, it is argued that a report about "Japanese observation of naval vessels" violates the law. Apparently, the government contends that it would be a crime for a person who saw a foreigner taking pictures of a United States warship to tell someone about it; or perhaps not a crime for an American newspaper reporter, but a crime for a foreign newspaper reporter!

On page 32, the government argues that "knowledge of a foreign nation that we know of their knowledge of the limitations of our instruments of war is related to the operation of those instruments". There is not the slightest evidence of this character in the present case, but this extension of the provisions of the Espionage Act shows the length to which the government is prepared to go in applying its broad construction of the Act to practically anything which government officials may not like.

On page 63, the government argues that the information contained in a few innocuous reports "presented a full picture of the work of the Naval Intelligence office at San Pedro so far as it was directed toward protection against Japanese espionage". This statement cannot be true. In fact, Lieutenant Claiborne, on instructions from the Secretary of the Navy, declined to produce all the other reports and files of defendant Salich. But this illustrates how the argument of the government is compounded of an exaggeration of the importance of the revealed information in order to relate it to the national

defense, and then an exaggeration of the scope of the law in order to bring the wrongdoing of petitioners within the definition of a crime punishable by imprisonment for twenty years in time of peace, and longer, or by death, in time of war.

Conclusion

In conclusion, counsel for petitioners, as members of the Bar, venture to submit that the issue in this case is much more important than whether justice has been done to the petitioners, which is, of course, their particular concern. Their conduct was confessedly wrong. Even the extreme severity of punishment would not warrant an impassioned appeal—if they had been convicted of an offense defined as a crime in the federal statutes. But it is of the highest importance to uphold the constitutional safeguards of the administration of justice in the United States. No sympathy or antagonism for individuals should impair the maintenance of those standards. Whether petitioner Gorin goes to jail or is deported; whether petitioner Salich goes to jail or into the ranks of the unemployed, stigmatized as unworthy of confidence, the extent or adequacy of their punishment is not the issue submitted to this high Court.

The issue here submitted is whether that which is made a crime must be clearly defined by law so that anyone offending against the law knows or should know that he is making himself a criminal, or whether a crime can be legally defined in such broad terms that no one can be sure that he is not violating the criminal law when carrying on what are normally regarded as legitimate activities. There are today millions upon millions of

workers engaged in the production, transportation and use of things essential to the national defense—persons who are able to, and may, reveal information regarding these things which may be used to the injury of the United States or to the advantage of a foreign nation. There should be a federal law defining where and when and what information cannot be revealed. Departments of government should be authorized further to define by regulations and to carry out the purpose of such a law.

The Congress found great difficulty in 1917, in a time of war, to write such a law, and at the same time to preserve the freedom of exchange of information necessary to the maintenance of a democratic government. The Congress may have erred on the side of preserving the liberties of a free people, in attempting to restrict the application of the Espionage Act to a too limited area. But it is certain that the Congress did not enact, and would not enact, a law making it a crime to reveal any information which a jury might subsequently regard as connected with, or related to the national defense. No such law should be written by the concert of administrative and judicial interpretation, expanding the provisions of the present Espionage Act. When such a law is written by the Congress, it can be presumed that offenses from the grade of misdemeanor to capital offense will not be lumped together for the same punishment in one enactment prohibiting the revelation of both trivial and important information "connected with or related to the national defense".

We submit that petitioners have been convicted of an offense not defined as a crime in the law under which

they were convicted, and that the judgments should be reversed.

Respectfully submitted,

DONALD R. RICHBERG,
SETH W. RICHARDSON,
ISAAC PACHT,
CLORE WARNE,
Attorneys for Petitioner M. N. Gorin.
HARRY GRAHAM BALTER,
Attorney for Petitioner H. Salich.
WILLARD J. STONE, JR.,
Of Counsel for Petitioner Salich.